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No. 85-581

In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID BULLOCH, ET AL., PETITIONERS

v.

PAUL B. PEARSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* 1

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This case (*Bulloch III*) is a companion to *Bulloch* v. *United States,* petition for cert. pending, No. 85-472 (*Bulloch II*). In *Bulloch II,* petitioners seek review of the court of appeals' decision that they failed to substantiate a claim that the government committed fraud upon the court in Federal Tort Claims Act suits litigated nearly 30 years ago. In the instant *Bivens* action, petitioners seek review of the court of appeals' decision that they are collaterally estopped from relitigating issues resolved adversely to them in *Bulloch II.*

1. a. The relevant background is discussed in our brief in opposition in *Bulloch II.* In 1955, petitioners filed suits against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the District of Utah, alleging that their sheep had been killed by ionizing radiation from one or more of the open-air atomic weapons tests conducted in

Nevada two years earlier. Following trial of one of those suits as the lead case, petitioners' FTCA claims were dismissed because "[t]he great weight of the evidence indicate[d]" that the deaths of petitioners' sheep had not been caused by radiation. *Bulloch* v. *United States,* 145 F. Supp. 824, 828 (D. Utah 1956) (*Bulloch I*).

Approximately 25 years later, petitioners filed suit to set aside the judgment in *Bulloch I* for alleged fraud upon the court. Petitioners claimed that the government had obtained the judgment in *Bulloch I* by means of "pressuring witnesses, withholding information, and giving misleading answers to interrogatories" (Pet. App. 2a). The district court accepted petitioners' contentions, but the court of appeals reversed. *Bulloch* v. *United States,* 95 F.R.D. 123 (D. Utah 1982), rev'd, 763 F.2d 1115 (10th Cir. 1985) (en banc), petition for cert. pending, No. 85-472 (*Bulloch II*). The court of appeals held that "none of the[] several findings or conclusions" upon which the district court based its decision "are supported by the record" (763 F.2d at 1119). Rather, the court concluded that "there was no evidence whatever" (*id.* at 1120) of "fraud on the court or any other kind of fraud" (*id.* at 1122) and that, although "the assertions [by petitioners] of fraud against the Government, the witnesses, the Government employees, the experts and the attorneys for the Government were all fully tried and considered [in *Bulloch II*]," petitioners "were unable to make a case against anyone concerned" (*id.* at 1120).

b. The instant case, denominated as *Bulloch III,* "stems from the *Bulloch II* proceedings" (Appellants' C.A. Br. 4). Based on a theory of constitutional tort under *Bivens* v. *Six Unknown Agents,* 403 U.S. 388 (1971), petitioners seek money damages from individual government attorneys and employees involved in *Bulloch I* on the ground that the "same actions by the federal defendants [alleged in *Bulloch II*] deprived [petitioners] of a fair trial and due process [in

Bulloch I]" (Pet. App. 14a). *Bulloch III* was filed shortly after *Bulloch II* was commenced, and petitioners' amended complaint in *Bulloch III* is modeled on and incorporates by reference the district court's findings in *Bulloch II* (which, as noted above, were subsequently rejected by the court of appeals).

The district court, acting prior to the court of appeals' decision in *Bulloch II,* dismissed petitioners' complaint in *Bulloch III* (Pet. App. 6a-31a). With respect to the claims against the government attorneys, the court held that these defendants were entitled to absolute immunity because "the allegations against [them] are based completely on their actions as defense counsel for the government" (*id.* at 17a). As to the non-attorney defendants, the court held that, even accepting the truth of petitioners' complaint, the allegations did not rise to the level of a constitutional violation and thus did not state a cause of action under *Bivens* (*id.* at 27a, 30a).

The court of appeals affirmed (Pet. App. 1a-5a). Without "reach[ing] either of the grounds upon which the district court based its holding" (*id.* at 3a), the court of appeals concluded that petitioners were collaterally estopped in *Bulloch III* from relitigating the issues that had been resolved adversely to them in the intervening decision in *Bulloch II.* Because "the allegations [petitioners] are now pressing against the government defendants in their individual capacities are identical to the allegations they made in *Bulloch II*" (*id.* at 4a), the court of appeals upheld the dismissal of the complaint.

2. Petitioners argue that the court of appeals misconstrued their complaint in stating that "in order for them to prevail on their due process claim they must establish that the government defendants' actions and omissions constituted fraud on the court" (Pet. App. 4a-5a). As petitioners

essentially concede, however (Pet. 6, 7 n.7), this fact-bound issue does not warrant review by this Court.[1]

In any event, the decision of the court of appeals is correct. In fact, petitioners admitted in their "own pleadings [that], in order to succeed on their due process claim, they must first establish fraud on the court" (Pet. App. 5a). Petitioners' amended complaint in this case incorporated by reference the district court's decision in *Bulloch II* and contained as its central allegation the claim that "[b]ecause of the fraudulent conduct * * * as found by this Court, the defendants * * * wrongfully deprived the plaintiffs of their right to a fair trial and to due process" (Amended Complaint ¶ 110; I R. 141). And the other allegations in that complaint reiterate the findings of the district court in *Bulloch II* and are, as the court of appeals noted, "fraught with allegations of fraud upon the court" (Pet. App. 5a n.2). See, *e.g.*, ¶¶ 49-66, 67-80, 82-89, 111-115, 118-123, 141-177; I R. 129-137, 141-143, 146-152. Thus, the record adequately supports the court of appeals' conclusion that petitioners "allege[d] fraud on the court as a prerequisite to their *Bivens* claim" (Pet. App. 5a).

Of course, "the ultimate claim in the present case—denial of due process—is different from the primary claim in *Bulloch II*—fraud on the court" (Pet. App. 4a). But even though the underlying legal questions may differ somewhat, the factual allegations on which their *Bivens* action rests are, as petitioners "concede[,] * * * identical to the allegations they made in *Bulloch II*" (Pet. App. 4a). See, *e.g.*, II R.

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[1] In *Bulloch II*, the government has argued that the petition for a writ of certiorari pending in that case should be denied. However, even if the Court were to grant the petition in *Bulloch II* and ultimately reverse the judgment of the court of appeals, the collateral estoppel question in the instant petition would not warrant plenary review. Rather, in those circumstances, this petition should be held pending *Bulloch II* and then disposed of as appropriate in light of that decision.

303-304, 305, 493-494, 503-504, 519-521, 530-535; III R. 621, 643, 648. Accordingly, even if petitioners had not premised their due process claim on the theory of fraud upon the court, the factual issues relevant to both questions would remain the same. Since petitioners "had a full and fair opportunity to litigate" in *Bulloch II* (Pet. App. 5a), and since the court of appeals determined in *Bulloch II* that there was no evidence whatsoever of fraud of any kind (see page 2, *supra*), their contentions in this case are foreclosed. Collateral estoppel precludes " 'a litigant in one lawsuit * * * [from], in a later lawsuit, assert[ing] the contrary of issues actually decided in and necessary to the judgment of the first suit' " (*id.* at 3a (citation omitted)), and petitioners are not free to relitigate the factual issues involved in *Bulloch II* "under the guise of a *Bivens* action based on alleged violations of due process" (*id.* at 5a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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